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No. 96-320

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,
v.
MICHAEL BUCKLEY,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Metro-North Commuter Railroad Company, has consented to AAR's filing of a brief.[1] Respondent, Michael Buckley, has refused consent.

Amicus curiae AAR is an incorporated, nonprofit trade association representing the nation's major

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[1] The letter expressing consent has been filed with the Clerk of the Court.

freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue. Over the past decade, the railroad industry has seen a sharp increase in the number of FELA claims filed alleging emotional injury. This phenomenon has raised important issues about the intended scope of FELA and poses the potential for greatly expanding railroad liability. In recognition of the importance of this issue, AAR filed briefs to this Court in the cases of *Atchison, Topeka & Santa Fe* v. *Buell*, 480 U.S. 557 (1987) and *Consolidated Rail Corp.* v. *Gottshall*, 114 S. Ct. 2396 (1994), both of which raised aspects of the issue.

When AAR appears before a court as *amicus curiae* in an FELA case it brings a broad, industry-wide perspective to the issue. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole.

Because of its long involvement with FELA, AAR is in an excellent position to address questions arising under that unique statute. AAR conducts an anual survey of the FELA experience of its member railroads, and compiles and maintains the results. This represents, to AAR's knowledge, the most comprehensive database on FELA costs and trends in existence.[3]

AAR works closely with its member roads' litigation counsel on problems associated with FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, a 1200 member organization of attorneys representing railroad companies in personal injury litigation. As a result, AAR is thoroughly familiar with the trends and problems associated with FELA.

AAR has spearheaded railroad industry legislative efforts to bring treatment of railroads in the area of employer liability into conformity with all other industries, which are covered by no-fault workers' compensation laws. During the course of these efforts, AAR has worked with the shortline and regional railroads, as well as the commuter authorities, all of whom are also governed by FELA, but whose perspectives may be somewhat different from the large freight roads which mostly constitute AAR's membership. Consequently, AAR has become familiar with the impact of FELA on all components of the rail industry.

AAR's primary interest with regard to FELA in the judicial arena is to prevent courts from expanding railroad liability beyond FELA's intent. Lower courts sometimes fail to appreciate that FELA is a unique statute. While FELA's obligation to respond in unlimited damages is unprecedented, and substantial compared to the obligations imposed on other employers, FELA limits employer obligations in some

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[2] *E.g.*, *Monessen Southwestern Ry. Co.* v. *Morgan*, 486 U.S. 330 (1988); *Burlington Northern R.* v. *Oklahoma Tax Commission*, 481 U.S. 454 (1986); *Burlington Northern R.* v. *Anderson*, 709 P.2d 641 (Mont. 1985), *cert. denied*, 476 U.S. 1116 (1986).

[3] *See* ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (published annually).

ways that workers' compensation does not. Moreover, the problem is compounded by FELA's liberal venue provision, which affords plaintiffs wide latitude in selecting the site of litigation, as well as the ability to bring and maintain an action in state court. Thus, aberrant court decisions can have a far reaching impact. So long as Congress continues to keep this regime in place, railroads will avail themselves of their legal rights in an effort to limit their liability, and AAR will support those efforts.

In this case, the lower court has issued a decision that imposes FELA liability for emotional injuries beyond the scope delineated by this Court in its recent *Gottshall* decision. This decision will impact a significant portion of the railroad industry, not just the individual railroad involved. In this case, as in others, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 per cent of the rail industry's line haul mileage, produce 93 per cent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-fault workers' compensation statutes in this country, Congress structured a tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated and insurance type benefits are provided to injured workers. No-fault workers' compensation systems now cover all other industries and workers except railroad employees and seamen.[1]

Each year several thousand FELA lawsuits are filed against AAR members, and many more claims are settled before a suit is filed. AAR's members expend substantial sums of money defending FELA claims and suits and in the payment of FELA settlements and verdicts, far more, by any reasonable standard of comparison, than is spent by other industries in connection with compensating employees for work related injuries.[2]

The Second Circuit's decision in *Buckley* v. *Metro-North Commuter Railroad*, 79 F.3d 1337 (2nd Cir. 1996) is of particular concern to AAR's members. The ruling below circumvents the carefully crafted limits on liability in emotional injury cases established by this Court in *Consolidated Rail Corp.* v. *Gottshall*, 114 S. Ct. 2396 (1994), and opens the door to an entirely new class of FELA claims. As a result, it exposes railroads to the potential for far greater liability than was intended under FELA as interpreted by this Court.[3]

[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688.

[2] Private industry as a whole pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), compared to nearly $2.00 for railroads. ASSOCIATION OF AMERICAN RAILROADS, 1995 CLAIM & LITIGATION REPORT 2-2 (May 1996) (CLAIM & LITIGATION REPORT). Over the past five years, AAR members have spent, on average, $1.2 billion on FELA annually, or about 3.7 per cent of their gross revenues. CLAIM & LITIGATION REPORT (calendar years 1991, 1992, 1993, 1994, 1995).

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

SUMMARY OF THE ARGUMENT

In *Gottshall*, this Court held that the common law zone of danger test must be applied to claims for negligent infliction of emotional distress under FELA. The *Gottshall* holding acknowledged the need for establishing some restrictions on the right to recover for negligent infliction of emotional distress. In *Buckley*, the court ruled that a railroad employee who was exposed to asbestos on the job may maintain a cause of action for negligent infliction of emotional distress under FELA despite the fact that he has no asbestos-related disease, displays no clinical evidence of physical injury, and was exposed to no immediate

[3] AAR submits this brief to address the substantial deleterious consequences that the *Buckley* decision, if allowed to stand, will have on the railroad industry. AAR respectfully refers the Court to Metro-North's petition for certiorari and the amicus curiae brief submitted by the Consolidated Rail Corporation for a fuller discussion of the *Buckley* decision's marked departure from well-established legal precedent under both FELA and common law.

risk of physical injury from an impact. This ruling is inconsistent to *Gottshall*.

If allowed to stand, *Buckley* will significantly and improperly expand railroad liability under FELA. While the Second Circuit purported to limit its decision to the unusual circumstances of the plaintiff's case, it enunciated no principles offering guidance as to when a claim for negligent infliction of emotional distress, alleged as a result of a workplace exposure, would be cognizable. In recent years thousands of rail employes have filed claims based on exposure to asbestos and other substances or environmental conditions in the workplace that allegedly cause future disease. Under *Buckley*, whether or not they have symptoms, these employees would all be in a position to assert that the railroad is liable for damages for emotional distress they suffer over the prospect of future illness.

ARGUMENT

In *Gottshall*, this Court closed the door to "unpredictable and nearly infinite liability." 114 S. Ct. at 2411. In the case at bar, the Second Circuit has flung that door wide open. In *Buckley*, the court ruled that a railroad employee who was exposed to asbestos on the job may maintain a cause of action for negligent infliction of emotional distress under FELA despite the fact that he has no asbestos-related disease, displays no clinical evidence of physical injury, and was exposed to no immediate risk of physical injury from an impact. 79 F.3d 1337 (1996). Moreover, the court was undeterred by the lack of objective evidence supporting plaintiff's claim that he suffered an "emotional injury" beyond his own assertions of fear and anger. *Id.* at 1346. This ruling is

directly contrary to *Gottshall*. Significantly, it will allow rail employees who can allege occupational exposure to an environmental condition that may be linked to a disease to recover unlimited damages under FELA, despite the fact they have no physical injury, may never become ill, and may never even display physical symptoms of injury or disease.

Petitioner has demonstrated the errors in the decision below, and its conflict with decisions of other courts, warranting review by this Court. Review is further warranted because the holding below is not, as the Second Circuit suggests, a narrow ruling affecting a very limited number of claims. Rather, it is a significant departure from precedent that will have a substantial economic impact on all railroad employers.

THE SECOND CIRCUIT'S MISAPPLICATION OF *GOTTSHALL* WILL CREATE A NEW AND UNPRECEDENTED CLASS OF FELA CLAIMS

In *Gottshall*, this Court held that the common law zone of danger test must be applied to claims for negligent infliction of emotional distress under FELA. That test, the Court ruled, is "consistent with FELA's central focus on physical perils." 114 S. Ct. at 2410. The *Gottshall* holding acknowledged the need for compromise between the desire to compensate all genuine claims and equally compelling countervailing policies warranting well founded restrictions on the right to recover for negligent infliction of emotional distress. *Id.* at 2411.[4] The Second Circuit's approval

[4] The Court stated that among the policies underlying common law restrictions on recovery for negligent infliction of emotional distress are: the potential flood of trivial suits, the possibility of fraudulent claims that are difficult for judges

of Buckley's claim in the absence of any physical injury, or any immediate risk of physical harm, is inconsistent with *Gottshall*'s teaching.

The Second Circuit set aside concerns over the flood of litigation that might follow its unprecedented ruling, and opted for a "more flexible view" as "most consistent with FELA's remedial nature." 79 F.3d at 1345.[5] However, as this Court has pointed out, railroads are *not* insurers of their employees' emotional well being, and notions of negligence and injury under FELA are grounded in the common law. *Gottshall* 114 S. Ct. at 2404.[6] Though the court professed to acknowledge as much at the outset of its

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and juries to detect, and the specter of unlimited and unpredictable liability. 114 S. Ct. at 2411.

[5] As Petitioner points out, the precedents relied on by the Second Circuit, *Hagerty* v. *L & L Marine Servs.*, 788 F.2d 315 (5th Cir. 1986) and *Lavelle* v. *Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (Ohio Ct. C.P. 1987), are distinguishable. Pet. Br. at 12, n.8.

[6] Though it is often recited that FELA is to be liberally interpreted, what frequently is overlooked is that, to the extent there is a lowering of an FELA plaintiff's burden, it applies only to the issue of causation. *See, Rogers* v. *Missouri Pacific R.R.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957); *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108 (1963). *But see* Wellington & Sproul, *"In Whole or In Part" And the FELA: Time for a New Look at Proximate Causation and Damage Apportionment*, 32 The Chronicle 82 (Jan/Feb 1987). (Arguing that the legislative history of FELA does not support a relaxation of the standard of causation.) Moreover, *Gottshall* makes clear that "[o]nly to the extent of [] explicit statutory alterations is 'departure from the rules of common law'" permissible under FELA. 114 S. Ct. at 2404.

opinion, 79 F.3d at 1342, it went on to interpret FELA without regard to that admonition.[7]

While the Second Circuit characterized the case as "unusual", no principle enunciated in *Buckley* limits its holding to the particular facts of that case. The court described the plaintiff's exposure as "massive, lengthy, and tangible." *Id.* at 1345. However, this characterization offers virtually no meaningful guidance as to the circumstances under which a claim for emotional injury will be cognizable. The plaintiff exhibited no manifestation of any physical injury and introduced, at best, scant evidence of emotional distress.[8] He elicited testimony that his exposure resulted in only a one to three percent increased risk of cancer.[9] Given these facts, it is difficult to read the *Buckley* opinion as anything but expansive, opening the floodgates *Gottshall* intended to close.

The threat *Buckley* poses to the railroad industry is great. Although asbestos has not been generally used in the railroad industry for years, rail employees continue to bring large numbers of FELA claims alleging injury from exposure to asbestos, as the latency period before manifestation of disease, if it occurs at all, can be up to 40 years. Since 1990, over 14,000 new asbestos claims have been brought against

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[7] *See* part II of the brief of amicus curiae Consolidated Rail Corporation for a fuller discussion of the Second Circuit's disregard for common law precedent.

[8] Not only did plaintiff not claim any physical injury, but the Mount Sinai doctors who examined him could find no clinical evidence of asbestos exposure or disease. *See* 79 F.3d at 1341.

[9] *Id.*

American railroads.[10] In many of these cases the railroad defense is that the plaintiff suffers no disease, or at least not one caused by exposure to asbestos.

AAR anticipates that, if *Buckley* is allowed to stand, the numbers of asbestos claims against railroads will increase, as workers suffering not even the slightest physical injury file claims for emotional distress based on alleged exposure to asbestos. Railroad claims experience shows that many rail workers have alleged exposure to asbestos. While the facts surrounding those alleged exposures may be different, the Second Circuit's legal analysis provides no way to distinguish Buckley's exposure from the exposure of other rail employees. In addition to those who have brought asbestos claims against their employers, there may well be many other rail employees who may believe they have been exposed to asbestos but have not yet brought a claim. Under *Buckley*, whether or not they have symptoms, these employees would all be in a position to assert that the railroad is liable for damages for emotional distress they suffer over the prospect of future illness. There would be no need to demonstrate even the slightest present health effects caused by their alleged exposure.

FELA claims for negligent infliction of emotional distress would not be limited to employees allegedly exposed to asbestos. Rail employees have brought FELA suits based on workplace exposure to other substances which have been alleged to cause future injury. Some of the more common examples include: diesel exhaust, *see e.g.*, *Summers* v. *Missouri Pacific R.R.*, 897 F. Supp. 533 (E.D. Okl. 1995); silica

[10] Data on the number of asbestos and other occupational illness claims have been supplied to AAR by its large member railroads.

dust, *see e.g.*, *Wooden* v. *Missouri Pacific R.R.*, 862 F.2d 560 (5th Cir. 1989); and chemical solvents, *see e.g.*, *Ulfik* v. *Metro North Commuter R.R.*, 77 F.3d 54 (2nd Cir. 1996). Since 1990, over 2000 FELA claims have been filed alleging exposure to various toxic substances (other than asbestos).[11] In fact, as the rail industry becomes a safer place to work, FELA claims alleging traumatic injury are fast being replaced by claims alleging an occupational illness, usually brought about by some alleged long term exposure to a deleterious environmental condition.

There is certainly controversy and dispute over whether the substances which form the bases for the new wave of FELA claims do, in fact, cause disease. The *Buckley* decision does not, however, require that there be anything other than a minimal increased risk that the plaintiff will ultimately contract a disease as a result of the exposure.[12] To the contrary, *Buckley* could well be read to support awarding damages for emotional distress to numerous rail employees who testify that they are angry and upset as a result of alleged exposure to a substance in the workplace, which, through some medical testimony, can be linked to the possibility of some future disease. In many, perhaps most, of these cases the future disease will never occur. If *Buckley* is overturned, those employees who do contract a disease will not be left without a remedy. They will be able to bring a FELA claim to recover all damages suffered, both for physical and mental injury.

[11] *See supra* note 10.

[12] *See supra* note 9 and accompanying text.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit in this case should be granted.

Respectfully submitted,

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